

AMENDED IN SENATE JUNE 24, 1998
AMENDED IN ASSEMBLY JANUARY 26, 1998
AMENDED IN ASSEMBLY JANUARY 5, 1998

CALIFORNIA LEGISLATURE—1997–98 REGULAR SESSION

ASSEMBLY BILL

No. 231

Introduced by Assembly Member Honda

February 6, 1997

An act to amend Sections 350 and 12022.6 of the Penal Code, relating to crimes.

LEGISLATIVE COUNSEL'S DIGEST

AB 231, as amended, Honda. Counterfeit of a mark: punishment.

(1) Existing law prohibits, without the consent of the registrant, the willful manufacture, intentional sale, or knowing possession for sale at the point of sale of any counterfeit of a mark registered with the Secretary of State or registered on the Principle Register of the United States Patent and Trademark Office, and imposes specified fines and punishment based upon the number of counterfeit marks involved in the offense. Existing law also provides definitions for specified terms, including “counterfeit mark,” “value,” and “at the point of sale.”

This bill would revise this provision to delete the ~~elements~~ *element* of consent ~~and willful manufacture~~ from the offense and modify the element of knowing possession for sale by deleting reference to “at the point of sale.” This bill also would

revise the definitions included in this provision—and increase the fines and punishment imposed. By increasing the punishment for *changing the definition* of a crime, the bill would create a state-mandated local program.

(2) Existing law makes it a public offense to knowingly possess for sale, at a location other than the point of sale, any counterfeit mark.

This bill would repeal this provision.

(3) The bill would make conforming changes.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 ~~SECTION 1. Section 350 of the Penal Code is~~
2 ~~amended to read:~~

3 *SECTION 1. Section 350 of the Penal Code is*
4 *amended to read:*

5 350. (a) Any person who, ~~without the consent of the~~
6 ~~registrant~~, willfully manufactures, intentionally sells, or
7 knowingly possesses for sale ~~at the point of sale~~ any
8 counterfeit of a mark registered with the Secretary of
9 State or registered on the Principal Register of the United
10 States Patent and Trademark Office, shall upon
11 conviction, be punishable as follows:

12 (1) Where the offense involves less than 1,000 of the
13 articles described in this subdivision, *with a total retail or*
14 *fair market value less than that required for grand theft*
15 *as defined in Section 487*, and if the person is an
16 individual, he or she shall be punished by a fine of not
17 more than five thousand dollars (\$5,000), by
18 imprisonment in a county jail for not more than one year,
19 or by both that fine and imprisonment; or, if the person

1 is a corporation, by a fine of not more than one hundred
2 thousand dollars (\$100,000).

3 (2) Where the offense involves 1,000 or more of the
4 articles described in this subdivision, *or has a total retail*
5 *or fair market value equal to or greater than that required*
6 *for grand theft as defined in Section 487*, and if the person
7 is an individual, he or she shall be punished by
8 imprisonment in a county jail not to exceed one year, or
9 in the state prison for 16 months, or two or three years, by
10 a fine not to exceed two hundred fifty thousand dollars
11 (\$250,000), or by both that imprisonment and fine; or, if
12 the person is a corporation, by a fine not to exceed five
13 hundred thousand dollars (\$500,000).

14 (b) Any person who has been convicted of a violation
15 of either paragraph (1) or (2) of subdivision (a) shall,
16 upon a subsequent conviction of paragraph (1) of
17 subdivision (a), if the person is an individual, be punished
18 by a fine of not more than fifty thousand dollars (\$50,000),
19 by imprisonment in a county jail for not more than one
20 year, or in the state prison for 16 months, or two or three
21 years, or by both that fine and imprisonment; or, if the
22 person is a corporation, by a fine of not more than two
23 hundred thousand dollars (\$200,000).

24 (c) Any person who has been convicted of a violation
25 of subdivision (a) and who, by virtue of the conduct that
26 was the basis of the conviction, has directly and
27 foreseeably caused death or great bodily injury to another
28 through reliance on the counterfeited item for its
29 intended purpose shall, if the person is an individual, be
30 punished by a fine of not more than fifty thousand dollars
31 (\$50,000), by imprisonment in the state prison for two,
32 three, or four years, or by both that fine and
33 imprisonment; or, if that person is a corporation, by a fine
34 of not more than two hundred thousand dollars
35 (\$200,000).

36 ~~(d) Any person who knowingly possesses for sale, at a~~
37 ~~location other than the point of sale, any article described~~
38 ~~in subdivision (a) is guilty of a public offense.~~

39 ~~(1) A violation of this subdivision involving less than~~
40 ~~100 of these articles shall be punishable by imprisonment~~

~~1 in a county jail for not more than six months, by a fine not
2 to exceed five thousand dollars (\$5,000), or by both that
3 imprisonment and fine. Any person who previously has
4 been convicted of a violation of any paragraph of this
5 subdivision shall, upon a new conviction of violating this
6 subdivision arising from conduct described in this
7 paragraph, be punished by imprisonment in a county jail
8 not to exceed one year, or by a fine not to exceed ten
9 thousand dollars (\$10,000), or by both that imprisonment
10 and fine. Any person who has been convicted of a
11 violation of any paragraph of this subdivision on two or
12 more previous occasions shall, upon a new conviction of
13 violating this paragraph, be punished by imprisonment in
14 a county jail not to exceed one year, or in the state prison
15 for 16 months, or two or three years, by a fine not to
16 exceed twenty-five thousand dollars (\$25,000), or by both
17 that imprisonment and fine.~~

~~18 (2) A violation of this subdivision involving 100 or
19 more of these articles, but less than 1,000, shall be
20 punishable by imprisonment in a county jail not to exceed
21 one year, by a fine not to exceed ten thousand dollars
22 (\$10,000), or by both that imprisonment and fine. Any
23 person who previously has been convicted of a violation
24 of any paragraph of this subdivision on one or more
25 occasions shall, upon a new conviction of violating this
26 subdivision arising from conduct described in this
27 paragraph, be punished by imprisonment in a county jail
28 not to exceed one year, or in the state prison for 16
29 months, or two or three years, by a fine not to exceed
30 twenty-five thousand dollars (\$25,000), or by both that
31 imprisonment and fine.~~

~~32 (3) A violation of this subdivision involving 1,000 or
33 more of these articles shall be punishable by
34 imprisonment in a county jail not to exceed one year, or
35 in the state prison for 16 months, or two or three years, by
36 a fine not to exceed one hundred thousand dollars
37 (\$100,000), or by both that imprisonment and fine.~~

~~38 (e) In any action brought under this section resulting
39 in a conviction or a plea of nolo contendere, the court
40 shall order the forfeiture and destruction of all of those~~

1 marks and of all goods, articles, or other matter bearing
2 the marks, and the forfeiture and destruction or other
3 disposition of all means of making the marks, and any and
4 all electrical, mechanical, or other devices for
5 manufacturing, reproducing, transporting, or assembling
6 these marks, that were used in connection with, or were
7 part of, any violation of this section. However, no vehicle
8 shall be forfeited under this section that may be lawfully
9 driven on the highway with a class 3 or 4 license, as
10 prescribed in Section 12804 of the Vehicle Code, and that
11 is any of the following:

12 (1) A community property asset of a person other than
13 the defendant.

14 (2) The sole class 3 or 4 vehicle available to the
15 immediate family of that person or of the defendant.

16 (3) Reasonably necessary to be retained by the
17 defendant for the purpose of lawfully earning a living, or
18 for any other reasonable and lawful purpose.

19 ~~(f)~~

20 (e) As used in this section, the following definitions
21 shall apply:

22 (1) When counterfeited but unassembled components
23 of computer software packages are recovered, including,
24 but not limited to, counterfeited computer diskettes,
25 instruction manuals, or licensing envelopes, the number
26 of “articles” shall be equivalent to the number of
27 completed computer software packages that could have
28 been made from those components.

29 ~~(2) “At the point of sale” includes the entire building,~~
30 ~~structure, container, or vehicle in which the sale or~~
31 ~~attempted sale of an article has occurred.~~

32 ~~(3) “Counterfeit mark” means a spurious mark that is~~
33 ~~identical with, or substantially indistinguishable from~~
34 ~~confusingly similar to, a registered mark and is used on or~~
35 ~~in connection with the same type of goods or services for~~
36 ~~which the genuine mark is registered. It is not necessary~~
37 ~~for the mark to be displayed on the outside of an article~~
38 ~~for there to be a violation. For articles containing digitally~~
39 ~~stored information, it shall be sufficient to constitute a~~
40 ~~violation if the counterfeit mark appears on a video~~

1 display when the information is retrieved from the
2 article. The term “spurious mark” includes genuine
3 marks used on or in connection with spurious articles and
4 includes identical articles containing identical marks,
5 where the goods or marks were reproduced without
6 authorization of, or in excess of any authorization granted
7 by, the registrant.

8 ~~(4)~~

9 (3) “Knowingly possess” means that the person
10 possessing an article ~~actually knew that the article was not~~
11 ~~genuine~~ knew or had reason to believe that it was
12 spurious, or that it was used on or in connection with
13 spurious articles, or that it was reproduced without
14 authorization of, or in excess of any authorization granted
15 by, the registrant.

16 ~~(5)~~

17 (4) “Sale” includes resale.

18 ~~(6)~~

19 (5) “Value” has the following meanings:

20 (A) When counterfeit items of computer software are
21 manufactured or possessed for sale, the “value” of those
22 items shall be equivalent to the retail price or fair market
23 price of the true items that are counterfeited.

24 (B) When counterfeited but unassembled
25 components of computer software packages are
26 recovered, including, but not limited to, counterfeited
27 computer diskettes, instruction manuals, or licensing
28 envelopes, the “value” of those components of computer
29 software packages shall be equivalent to the retail price
30 or fair market ~~price~~ value of the number of completed
31 computer software packages that could have been made
32 from those components.

33 (C) “Retail or fair market value” of a counterfeit
34 article means a value equivalent to the retail price or fair
35 market value, as of the last day of the charged crime, of
36 a completed similar genuine article containing a genuine
37 mark.

38 ~~(g)~~

39 (f) This section shall not be enforced against any party
40 who has adopted and lawfully used the same or

1 confusingly similar mark in the rendition of like services
2 or the manufacture or sale of like goods in this state from
3 a date prior to the *earliest* effective date of registration of
4 the service mark or trademark ~~pursuant to Chapter 2~~
5 ~~(commencing with Section 14200) of Division 6 of the~~
6 ~~Business and Professions Code either with the Secretary~~
7 ~~of State or on the Principle Register of the United States~~
8 ~~Patent and Trademark Office.~~

9 ~~(h)~~

10 (g) An owner, officer, employee, or agent who
11 provides, rents, leases, licenses, or sells real property upon
12 which a violation of subdivision (a) ~~or (d)~~ occurs shall not
13 be subject to a criminal penalty pursuant to this section,
14 unless he or she sells, or possesses for sale, articles bearing
15 a counterfeit mark in violation of this section. This
16 subdivision shall not be construed to abrogate or limit any
17 civil rights or remedies for a trademark violation.

18 ~~350. (a) Any person who intentionally sells, or~~
19 ~~knowingly possesses for sale any counterfeit of a mark~~
20 ~~registered with the Secretary of State or registered on the~~
21 ~~Principal Register of the United States Patent and~~
22 ~~Trademark Office, shall upon conviction, be punishable~~
23 ~~as follows:~~

24 ~~(1) Where the offense involves less than 40 of the~~
25 ~~counterfeit marks described in this subdivision, with a~~
26 ~~retail or fair market value of four hundred dollars (\$400)~~
27 ~~or less, if the person is an individual, he or she shall be~~
28 ~~punished by a fine of not more than five thousand dollars~~
29 ~~(\$5,000), by imprisonment in a county jail for not more~~
30 ~~than one year, or by both that fine and imprisonment; or,~~
31 ~~if the person is a corporation, by a fine of not more than~~
32 ~~one hundred thousand dollars (\$100,000).~~

33 ~~(2) Where the offense involves 40 or more of the~~
34 ~~counterfeit marks described in this subdivision, or has a~~
35 ~~retail or fair market value of greater than four hundred~~
36 ~~dollars (\$400), and if the person is an individual, he or she~~
37 ~~shall be punished by imprisonment in a county jail not to~~
38 ~~exceed one year, or in the state prison for 16 months, or~~
39 ~~two or three years, by a fine not to exceed two hundred~~
40 ~~fifty thousand dollars (\$250,000), or by both that~~

~~1 imprisonment and fine; or, if the person is a corporation,
2 by a fine not to exceed five hundred thousand dollars
3 (\$500,000).~~

~~4 (b) Any person who, without the consent of the
5 registrant, willfully manufactures two or more articles
6 containing a counterfeit of a mark registered with the
7 Secretary of State or registered on the Principle Register
8 of the United States Patent and Trademark Office, shall
9 upon conviction, be punishable as follows:~~

~~10 (1) Where the offense involves less than 10 of the
11 counterfeit marks described in this subdivision, with a
12 retail or fair market value of four hundred dollars (\$400)
13 or less, if the person is an individual, he or she shall be
14 punished by a fine of not more than five thousand dollars
15 (\$5,000), by imprisonment in a county jail for not more
16 than one year, or by both that fine and imprisonment; or,
17 if the person is a corporation, by a fine of not more than
18 one hundred thousand dollars (\$100,000).~~

~~19 (2) Where the offense involves 10 or more of the
20 articles described as counterfeit marks in this subdivision,
21 or has a retail or fair market value of greater than four
22 hundred dollars (\$400), and if the person is an individual,
23 he or she shall be punished by imprisonment in a county
24 jail not to exceed one year, or in the state prison for two,
25 three, or four years, by a fine not to exceed five hundred
26 thousand dollars (\$500,000), or by both that
27 imprisonment and fine; or, if the person is a corporation,
28 by a fine not to exceed one million dollars (\$1,000,000).~~

~~29 (c) Any person who has been convicted of a violation
30 of this section shall, upon a subsequent conviction of
31 paragraph (1) of subdivision (a) or (b), if the person is an
32 individual, be punished by a fine of not more than five
33 hundred thousand dollars (\$500,000), by imprisonment in
34 a county jail for not more than one year or in the state
35 prison for two, three, or four years, or by both that fine
36 and imprisonment; or, if the person is a corporation, by a
37 fine of not more than one million dollars (\$1,000,000).~~

~~38 (d) Any person who has been convicted of a violation
39 of subdivision (a) or (b) and who, by virtue of the
40 conduct that was the basis of the conviction, has directly~~

1 ~~and foreseeably caused death or great bodily injury to~~
2 ~~another through reliance on the counterfeited item for its~~
3 ~~intended purpose shall, if the person is an individual, be~~
4 ~~punished by a fine of not more than five hundred~~
5 ~~thousand dollars (\$500,000), by imprisonment in the state~~
6 ~~prison for two, three, or four years, or by both that fine~~
7 ~~and imprisonment; or, if that person is a corporation, by~~
8 ~~a fine of not more than two million dollars (\$2,000,000).~~

9 ~~(e) In any action brought under this section resulting~~
10 ~~in a conviction or a plea of nolo contendere, the court~~
11 ~~shall order the forfeiture and destruction of all of those~~
12 ~~marks and of all goods, articles, or other matter bearing~~
13 ~~the marks, and the forfeiture and destruction or other~~
14 ~~disposition of all means of making the marks, and any and~~
15 ~~all electrical, mechanical, or other devices for~~
16 ~~manufacturing, reproducing, transporting, or assembling~~
17 ~~these marks, that were used in connection with, or were~~
18 ~~part of, any violation of this section. However, no vehicle~~
19 ~~shall be forfeited under this section that may be lawfully~~
20 ~~driven on the highway with a class 3 or 4 license, as~~
21 ~~prescribed in Section 12804 of the Vehicle Code, and that~~
22 ~~is any of the following:~~

23 ~~(1) A community property asset of a person other than~~
24 ~~the defendant.~~

25 ~~(2) The sole class 3 or 4 vehicle available to the~~
26 ~~immediate family of that person or of the defendant.~~

27 ~~(3) Reasonably necessary to be retained by the~~
28 ~~defendant for the purpose of lawfully earning a living, or~~
29 ~~for any other reasonable and lawful purpose.~~

30 ~~(f) As used in this section, the following definitions~~
31 ~~shall apply:~~

32 ~~(1) "Registrant" means any person to whom the~~
33 ~~registration of a mark is issued, his or her legal~~
34 ~~representatives, successors or assigns.~~

35 ~~(2) "Counterfeit mark" means a spurious mark that is~~
36 ~~identical with, or confusingly similar to, a registered mark~~
37 ~~and is used on or in connection with the same type of~~
38 ~~goods or services for which the genuine mark is~~
39 ~~registered. It is not necessary for the mark to be displayed~~
40 ~~on the outside of an article in order to constitute a~~

~~violation. For an article containing digitally stored information, it shall be sufficient to constitute a violation if the counterfeit mark appears on a video display when the information is retrieved from the article.~~

~~(3) “Knowingly possess” means that the person possessing an article knew or had reason to believe that the article contained a mark that was not genuine.~~

~~(4) “Sale” includes resale.~~

~~(5) “Retail or market value” of a counterfeit mark shall be equivalent to the retail price or fair market value of a completed, similar, genuine article containing the counterfeit mark.~~

~~(g) This section shall not be enforced against any party who has adopted and lawfully used the same or confusingly similar mark in the rendition of like services or the manufacture or sale of like goods in this state from a date prior to the earliest effective date of registration of the service mark or trademark either with the Secretary of State or on the Principle Register of the United States Patent and Trademark Office.~~

~~(h) An owner, officer, employee, or agent who provides, rents, leases, licenses, or sells real property upon which a violation of subdivision (a) occurs shall not be subject to a criminal penalty pursuant to this section, unless he or she sells, or possesses for sale, articles bearing a counterfeit mark in violation of this section. This subdivision shall not be construed to abrogate or limit any civil rights or remedies for a trademark violation.~~

SEC. 2. Section 12022.6 of the Penal Code is amended to read:

12022.6. (a) When any person takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction, the court shall impose an additional term as follows:

(1) If the loss exceeds fifty thousand dollars (\$50,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of one year.

1 (2) If the loss exceeds one hundred fifty thousand
2 dollars (\$150,000), the court, in addition and consecutive
3 to the punishment prescribed for the felony or attempted
4 felony of which the defendant has been convicted, shall
5 impose an additional term of two years.

6 (3) If the loss exceeds one million dollars (\$1,000,000),
7 the court, in addition and consecutive to the punishment
8 prescribed for the felony or attempted felony of which
9 the defendant has been convicted, shall impose an
10 additional term of three years.

11 (4) If the loss exceeds two million five hundred
12 thousand dollars (\$2,500,000), the court, in addition and
13 consecutive to the punishment prescribed for the felony
14 or attempted felony of which the defendant has been
15 convicted, shall impose an additional term of four years.

16 (b) In any accusatory pleading involving multiple
17 charges of taking, damage, or destruction, the additional
18 terms provided in this section may be imposed if the
19 aggregate losses to the victims from all felonies exceed
20 the amounts specified in this section and arise from a
21 common scheme or plan. All pleadings under this section
22 shall remain subject to the rules of joinder and severance
23 stated in Section 954.

24 (c) The additional terms provided in this section shall
25 not be imposed unless the facts of the taking, damage, or
26 destruction in excess of the amounts provided in this
27 section are charged in the accusatory pleading and
28 admitted or found to be true by the trier of fact.

29 (d) This section applies to, but is not limited to,
30 property taken, damaged, or destroyed in violation of
31 Section 502 or subdivision (b) of Section 502.7. This
32 section shall also apply to applicable prosecutions for a
33 violation of Section 350, 653h, 653s, or 653w.

34 (e) For the purposes of this section, the term “loss” has
35 the following meanings:

36 (1) When counterfeit items of computer software are
37 manufactured or possessed for sale, the “loss” from the
38 counterfeiting of those items shall be equivalent to the
39 retail price or fair market value of the true items that are
40 counterfeited.

1 (2) When counterfeited but unassembled components
2 of computer software packages are recovered, including,
3 but not limited to, counterfeited computer diskettes,
4 instruction manuals, or licensing envelopes, the “loss”
5 from the counterfeiting of those components of computer
6 software packages shall be equivalent to the retail price
7 or fair market value of the number of completed
8 computer software packages that could have been made
9 from those components.

10 (f) It is the intent of the Legislature that the provisions
11 of this section be reviewed within 10 years to consider the
12 effects of inflation on the additional terms imposed. For
13 that reason, this section shall remain in effect only until
14 January 1, 2008, and as of that date is repealed unless a
15 later enacted statute, which is enacted before January 1,
16 2008, deletes or extends that date.

17 SEC. 3. No reimbursement is required by this act
18 pursuant to Section 6 of Article XIII B of the California
19 Constitution because the only costs that may be incurred
20 by a local agency or school district will be incurred
21 because this act creates a new crime or infraction,
22 eliminates a crime or infraction, or changes the penalty
23 for a crime or infraction, within the meaning of Section
24 17556 of the Government Code, or changes the definition
25 of a crime within the meaning of Section 6 of Article
26 XIII B of the California Constitution.

27 Notwithstanding Section 17580 of the Government
28 Code, unless otherwise specified, the provisions of this act
29 shall become operative on the same date that the act
30 takes effect pursuant to the California Constitution.

